TESTIMONY BEFORE THE MICHIGAN SENATE

NATURAL RESOURCES, ENVIRONMENT AND GREAT LAKES COMMITTEE

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Presented by:

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Testimony of David L. Powers

Good Morning, Mr. Chairman and Senators. My name is David Powers. I am an attorney from Bay City, and have practiced law for 26 years. Since 2001, I have devoted a substantial part of my practice to the issue of riparian rights on the Great Lakes. I was involved in drafting the 2003 beach grooming law, and in negotiating the 2007 General Permit language. My firm has participated in several important court cases involving riparian rights, including *United States v. Kincaid* and *Glass v. Goeckel*. For the last five years, I represented the United States on the International Joint Commission's Upper Great Lakes Study, first as a member of its Public Interest Advisory Group, and later as the Group's US Co-Chair—and Study Board member. I am also a co-founder of Save Our Shoreline.

My purpose today is to set out what this bill does and does not do. But first, I would like to provide some background.

In Michigan, beaches are regulated under the Shorelands Protection and Management Act, known as Part 323 of NREPA. That law authorizes the MDEQ to designate those areas of the shoreline that are so important that they deserve protection. Under this law, the MDEQ has a duty to protect our high erosion areas like Critical Dunes, Our Flood Risk Areas, and

Environmental Areas. The law requires that MDEQ determine these areas by conducting studies and surveys. To designate someone's land as an "environmental area," the Department must show that the area is "necessary for the preservation and maintenance of fish and wildlife."

[Refer to Board #1]. The Department has done much of this work. This board shows you the counties around the state where they have designated land to be protected. In each of these counties, the Department has identified specific parcels of land to be protected under Part 323.

[Refer to Board #2]. This board is a compilation of maps of Environmental Areas for the Saginaw Bay. You will see that well more than half of the Bay is already protected as Environmental Areas. Today's bill does nothing to change the protection of these areas.

Instead, today's bill addresses what is left: For Saginaw Bay, less than half of its remaining shoreland. That is the land that's not regulated by Part 323.

Our problem—and the reason we are here today—is that the MDEQ continues its **effort to stretch the meaning** of two other

laws—Parts 303 and 325—to regulate what is left. They either try to say that beaches are "wetlands" under part 303, or they try to say our beaches are somehow regulated under part 325, the Submerged Lands Act.

We don't think these laws were ever intended to regulate beach grooming. Our beaches don't come within the definition of "wetland" under Part 303 (because they are not commonly referred to as bogs, swamps, or marshes—an essential part of the definition). And our dry beaches are not the state-owned "submerged lands" addressed by the Submerged Lands Act.

So ***this*** bill does two things: First, it clarifies that beaches are not regulated as "Wetland" under Part 303, or as "state owned submerged land" under Part 325. This was the primary thing we wanted to accomplish. As you know, we met with the Department, and they insisted they needed regulatory authority over beaches to prevent construction-related activities there. So to address their concerns, this bill ***for the first time*** prohibits activities on ***privately owned, unpatented lands,*** below a regulatory water mark—but adds beach grooming to a long list of existing exemptions.

Based on comments I have read and heard, I would like to be clear about what the bill DOES NOT do. It DOES NOT have the state giving up any public trust right. It DOES NOT take away the "beach walking" right referred to in the ***Glass v Goeckel*** decision. In fact, my view is that the bill ***serves*** the public trust by granting MDEQ express regulatory authority over private, unpatented land, up to the regulatory water mark—authority which to this point the Department claims for itself, but does not, in my view, have.

The bill DOES NOT expose valuable wetlands to imminent loss and destruction. As I have indicated, Part 323, the Shorelands Protection and Management Act, authorizes the Department to protect any area shown by studies and surveys to be ***necessary*** for the preservation of fish and wildlife. (As the slide shows, the valuable areas in the Saginaw Bay—for example--are already protected). The US Army Corps of Engineers regulates the same lands, and we can't forget that it was the Corps of Engineers—and not the state--that sued three retirees in 2001 for grooming the beaches in front of their retirement homes.

There may be some room for improvement under the bill. For example, the beach grooming exemption applies to land defined as that which is "commonly referred to as a beach." The Department

has expressed some concern with that definition, and we have expressed a willingness to consider alternate language, perhaps basing the definition on aerial photography from 1997.

Senator, it has been a great pleasure to work with you on this bill, along with Kendra and the rest of your staff. I look forward to working with you, the committee, and the co-sponsors to make any adjustments you deem necessary.

Thank you.